



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Lucas Place, Ltd.

File: B-238008; B-238008.2

Date: April 18, 1990

J. Michael Dorsey, Esq., McDowell, Rice & Smith, for the protester.
Samuel E. Skare, Esq., and S. Lane Tucker, Esq., Office of General Counsel, General Services Administration, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Procuring agency, in a negotiated procurement for the lease of office space, misled the protester in discussions by informing the protester that it must either include all of the electrical utility costs in rent or exclude all of it and provide separate meters for the government, while allowing the awardee to provide for the partial exclusion of the electrical utility costs from the rent. The protester, however, was not prejudiced by the agency's misleading discussions since it would not have been the low offeror, even if it had not been misled.
2. Where a protester disagrees with the agency's technical judgment concerning the quality of the neighborhood in which the awardee's building is located and whether the awardee has offered sufficient net usable square feet to satisfy the minimum space requirements of the solicitation for leased space, but has not shown that the agency's determinations lacked a reasonable basis, protest allegations that the procuring agency improperly evaluated the awardee's proposal are denied.
3. Protest allegation that the procuring agency improperly found the awardee to be responsible is dismissed since the General Accounting Office will not review affirmative determinations of responsibility except in limited

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circumstances not present here. The fact that the awardee has filed for bankruptcy under Chapter XI of the United States Bankruptcy Code does not require a finding of nonresponsibility.

DECISION

Lucas Place, Ltd., protests the award of a 15-year lease by the General Services Administration (GSA) to Gateway Complex Incorporated under solicitation for offers (SFO) No. XM089221 for 56,000 square feet of office space in the Gateway II building in Kansas City, Kansas, to house the regional office of the Department of Housing and Urban Development (HUD).^{1/} Lucas contends that GSA misled it during discussions, improperly evaluated Gateway's proposal, and erroneously determined Gateway to be responsible.

We deny the protest in part and dismiss it in part.

BACKGROUND

The SFO, issued on July 28, 1989, requested offers for the lease of between 55,783 and 56,000 net usable square feet of office space in the Kansas City metropolitan area for a lease term of 15 years.^{2/} The solicitation also provided

^{1/} GSA originally solicited its requirement for this office space in SFO No. M088-248, issued October 25, 1988, but canceled the solicitation after receipt of initial offers when the agency determined that several interested potential offerors, including Gateway, had buildings capable of meeting the solicitation requirements and were improperly rejected during a pre-solicitation market survey. Lucas protested the cancellation of the solicitation to our Office. We found that the agency had a reasonable basis to cancel and resolicit this requirement, given the agency's concern that its erroneous actions had resulted in less competition than was potentially available. Lucas Place, Ltd., B-235423, Aug. 30, 1989, 89-2 CPD ¶ 193.

^{2/} "Net usable space" is defined by the SFO to be all the gross area measured between the inside finish of the permanent exterior building walls, deducting "the following from the gross area including their enclosing walls: toilets and lounges, stairwells, elevators and elevator shafts, building equipment and service areas, entrance and elevator lobbies, stacks and shafts, and corridors in place or required by local codes and ordinances."

other specific requirements, such as the general architectural quality and appearance of the building exterior, the appearance of the neighborhood in which the building is located, and the location of the building with regard to local amenities and transportation.

Offerors were informed that award would be made to the acceptable offeror whose offer was most advantageous to the government, price and other factors considered, and that price was more important than the other factors, which were stated to be handicap accessibility and use of renewable energy.

The SFO provided that the evaluation of offers would be on the basis of the annual price per square foot, to which GSA would make a present value price evaluation by reducing the prices offered to a composite annual square foot price in accordance with a stated formula. The SFO also provided that if the cost of utilities was not included as a part of the rental consideration, the offeror must specify which utilities were excluded from the rent and provide:

"[S]eparate meters for utilities to be paid for by GSA. The [offeror] shall furnish the contracting officer, prior to occupancy by the government, written verification of the meter numbers and certification that these meters measure government usage only. Proration is not permissible."

GSA received 25 offers in response to the SFO. Two of these offers were determined to be unacceptable because they had been rejected during the market survey and another four offers were withdrawn. The remaining 19 offers, including the offers of Lucas and Gateway, were found to be in the competitive range. GSA conducted oral and written discussions with each of the competitive range offerors and requested best and final offers (BAFO). As a result of the agency's present value evaluation of offerors' rental costs, including evaluation of lump-sum costs, telephone costs, and discounts for historic preference, GSA determined that Gateway was the low offeror at \$6.95 per net usable square foot while Lucas was the third-low offeror at \$7.88 per net usable square foot. Award was made to Gateway on November 22, and this protest followed.

INTERESTED PARTY

GSA initially argues that Lucas is not an interested party to protest the award under our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1989), because Lucas is the third-low offeror and would not be in line for award if its protest were upheld. Lucas, however, is not merely challenging the award to Gateway but is arguing that it was deprived of the opportunity to compete with Gateway on an equal basis because it was misled during discussions. Since Lucas claims that it could have been the low offeror, absent GSA's misleading discussions, Lucas does qualify as an interested party. See General Electrodynamics Corp., B-221347.2, B-221347.3, May 13, 1986, 86-1 CPD ¶ 454.

MEANINGFUL DISCUSSIONS

Lucas protests that GSA misled it regarding the separate metering of utilities. Specifically, Lucas contends that GSA informed it during discussions that its initial proposal was not acceptable because it provided for separate metering of a portion of a utility (electricity) and that this was not allowed by the SFO. Lucas claims that GSA advised it that either the utility costs must be entirely included in the rent or entirely excluded and separately metered. Lucas states that, as a result of GSA's advice, it provided for separate metering of all of the electrical utility in its BAFO, at substantial additional expense. On the other hand, Gateway was allowed to provide for partial metering of the electrical utility in the same manner that Lucas had initially offered.

In negotiated procurements, procuring agencies are generally required to conduct meaningful discussions with all competitive range offerors; thus, the agencies must furnish information to all offerors in the competitive range as to the areas in which their proposals are believed to be deficient so that offerors may have an opportunity to revise their proposals to fully satisfy agency requirements. The government, however, does not satisfy its obligation to conduct meaningful discussions by misleading an offeror or by conducting prejudicially unequal discussions. Pan Am World Servs., Inc., et al., B-231840 et al., Nov. 7, 1988, 88-2 CPD ¶ 446.

We find that GSA misled Lucas during discussions concerning the separate metering of utilities with the result that Lucas did not offer the electrical utility in the manner it originally proposed. Lucas offered in its initial proposal to exclude from rent the cost of the government's electrical usage for lights, outlets and equipment which Lucas proposed to separately meter and charge to GSA while all other electrical costs (e.g., heating, ventilation and air conditioning, and common areas) were included in the base rent. In its BAFO, Lucas provided for the total exclusion and separate metering of the electrical utility. Gateway's BAFO, on the other hand, provided that "electricity for lights, office equipment, general use and computer room equipment to be metered to GSA."

Lucas states that, after the submission of initial proposals, GSA informed the protester during oral discussions that it must bid utilities, including electricity, by either including all of the utility costs in the base rent or by excluding all of it from the rent and providing separate metering, and Lucas has provided contemporaneous documents to support its position in this regard.

GSA denies that it told Lucas that it must either include all of a utility in rent or exclude all of it and provide separate metering. Rather, GSA contends that during oral discussions Lucas was informed that "submetering" or "proration" was not permitted. GSA contends that it explained in detail these restrictions to Lucas as requiring utilities excluded from the rent to be metered by the utility company and that the meter must read only usage in the government space and not usage in appurtenant areas not rented by the government (e.g., corridors and rest rooms).

All of the contemporaneous documents in the record, including GSA's own letter and notes, support the protester's contentions, while the agency failed to provide any documentation which supports its version of what it orally stated to the protester. Under the circumstances, we conclude that Lucas was informed by GSA that it must include all of the utility costs in its rent or exclude all of it and provide for separate meters. See Besserman Corp., B-237327, Feb. 14, 1990, 69 Comp. Gen. ___, 90-1 CPD ¶ 191. Since Gateway was allowed to provide for the partial exclusion of the electrical utility, we find that Lucas was misled during discussions.

Despite our conclusion, however, we will sustain a protest alleging that the government failed to conduct meaningful discussions with a firm only where the protester demonstrates that it was prejudiced by the government's actions. B.K. Dynamics, Inc., 67 Comp. Gen. 45 (1987), 87-2 CPD ¶ 429, aff'd, 67 Comp. Gen. 264 (1988), 88-1 CPD ¶ 165. The record here shows that Lucas was not prejudiced by GSA's misleading discussions.

Lucas argues that its BAFO price would have been \$6.94, or 1 cent less than Gateway's evaluated BAFO rent, if Lucas had been allowed to offer partial exclusion of the electric utility. In support of this contention, Lucas has provided detailed calculations, based upon the present value evaluation formula stated in the SFO, to demonstrate what its BAFO price would have been if it had offered the partial exclusion of the electrical utility, as it had originally intended. GSA contends that Lucas, in its calculations, used an incorrect estimate of the costs of the services to be provided by the government (i.e., electricity for lights, outlets and computer room).^{3/}

We agree with GSA. Lucas's estimate of the costs of these services to the government is 60 cents per net usable square foot. The record shows, however, that the government's independent estimate of these costs, which was calculated prior to date of discussions, is \$1.37 per net usable square foot. In this regard, GSA provided detailed support for its cost estimate of these services to the government. On the other hand, Lucas did not provide any support for its estimate or rebut the government's estimate, despite having the opportunity to do so. Accordingly, we conclude that Lucas's intended BAFO price should be calculated using GSA's estimate for these costs. When Lucas's BAFO price is recalculated using the proper estimate (and still using all of Lucas's other cost figures), Lucas's evaluated price is \$7.49 per net usable square foot, or 54 cents higher than Gateway's evaluated price.

Lucas also argues that it was prejudiced because the GSA cost evaluation improperly included 56 cents per net usable square foot for the costs of relocating telephone service, even though the SFO did not provide for the evaluation of this cost. However, we find from our review that this

^{3/} GSA contests other aspects of Lucas's calculations. However, we need not consider GSA's other concerns since we find that Lucas is not the low offeror when its BAFO price is recalculated using the proper estimate of the costs of these services to the government.

evaluation did not prejudice Lucas because these costs were also added to Gateway's evaluated price and Lucas would not have been the low offeror, even if the costs of telephone service relocation were not evaluated.4/

Therefore, Lucas would not have been the low offeror, even absent GSA's misleading discussions. Under the circumstances, Lucas has not been prejudiced, and its protest of this issue is denied.

EVALUATION OF AWARDEE'S PROPOSAL

Lucas also protests that GSA did not properly evaluate Gateway's proposal. Specifically, Lucas contends that Gateway's building does not satisfy the SFO requirements concerning location and minimum net usable square feet.5/

The evaluation of proposals is primarily within the discretion of the procuring agency, not our Office. Consequently, we will question an agency's technical evaluation only when the record shows that the evaluation does not have a reasonable basis or is inconsistent with the stated evaluation criteria. East, Inc., B-235687.2, Dec. 26, 1989, 89-2 CPD ¶ 591. The fact that the protester disagrees with the agency's judgment does not render the evaluation unreasonable. ESCO, Inc., 66 Comp. Gen. 404 (1987), 87-1 CPD ¶ 450.

4/ GSA, in its evaluation of these costs, added 56 cents per net usable square foot to Lucas's evaluated price and 42 cents per net usable square foot to Gateway's evaluated price. Thus, even if the costs of telephone service relocation were not evaluated, Lucas would not displace Gateway as the low offeror.

5/ In its conference comments, Lucas also argues for the first time that Gateway's building does not meet fire safety standards. GSA states that the basis of this allegation was known or should have been known to Lucas on December 8, 1989, when the protester was provided with a copy of Gateway's lease and space designs. Since Lucas did not raise this allegation until February 27, 1990, it is untimely and will not be considered here. See Golden Triangle Management Group, Inc., B-234790, July 10, 1989, 89-2 CPD ¶ 26.

Lucas contends that Gateway's offered building does not satisfy the solicitation's requirements concerning the quality of the neighborhood in which the space is located. In this regard, Lucas argues that GSA, in two prior pre-solicitation market surveys, found Gateway's building to be unacceptable due to its location.

The SFO, with regard to the neighborhood requirement, provided that:

"[S]pace must be located in a prime commercial office district with attractive, prestigious, professional surroundings with a prevalence of modern design and/or tasteful rehabilitation in modern use. Streets and public sidewalks should be well maintained."

GSA states that, while the awardee's building was found unacceptable in a 1987 pre-solicitation market survey, that the neighborhood and building had undergone significant rehabilitation since that date.^{6/} GSA contends that Gateway's building is located in what is now an attractive, professional neighborhood which meets all of the SFO requirements. In this regard, GSA states that Gateway's building currently houses the professional offices of an engineering firm, law firm, and a pharmacy and that a new federal building and courthouse is scheduled to be built within two blocks of the Gateway building.

Lucas disagrees with the agency's evaluation of the neighborhood and has provided us with photographs that it asserts demonstrates that the neighborhood is not attractive or professional. GSA responds that Lucas has selectively taken photographs of an area blocks away from Gateway's building and has provided its own pictures of the neighborhood surrounding Gateway's building.

^{6/} The second pre-solicitation market survey, to which Lucas refers, was the survey for the prior solicitation of this requirement. GSA canceled that solicitation after receipt of initial proposals when it properly determined that several offerors' buildings, including Gateway's, had been improperly found to be unacceptable in the market survey. See Lucas Place, Ltd., B-235423, supra.

We find no basis in the record to conclude that GSA's evaluation of the location of Gateway's building was unreasonable. Rather, it appears to us from the photographs provided by GSA that the awardee's building could be found to be situated in an attractive, professional center city location. While Lucas disagrees with the agency's evaluation, it has not shown unreasonable the agency's determination that Gateway's building satisfied the SFO neighborhood requirements.

Lucas also argues that Gateway has offered less than the required minimum amount of net usable square feet and that GSA, in measuring the amount of space offered by Gateway, failed to deduct for corridors as required by the SFO.^{7/} Thus, Lucas contends that Gateway's proposal is unacceptable and should have been rejected. Lucas also contends that Gateway's space design does not satisfy HUD's need for at least 12,000 square feet on one floor.

GSA states that Gateway's space design, which provides for 56,000 net usable square feet, satisfies the space requirements of the SFO. In this regard, GSA states that Gateway's design removes corridors currently in place and utilizes a design that provides a direct, obvious and unobstructed means of egress from each floor and that, therefore, local codes and ordinances would not require fixed corridors. GSA also states that there is no solicitation requirement for 12,000 square feet on one floor, as Lucas contends.

We agree with GSA that the SFO does not require that at least 12,000 square feet be on one floor, and, in any event, Gateway's space design provides several floors with more than 12,000 net usable square feet. Furthermore, from our review of the record, including Gateway's space designs, we find that Gateway offered sufficient net usable square feet to satisfy the solicitation requirements. Accordingly, we see no basis to question GSA's determination in this regard.

^{7/} Lucas in its arguments describes space designs for three single-tenant floors and two multi-tenant floors. However, the space designs provided to us involve three single-tenant floors and one multi-tenant floor.

RESPONSIBILITY

Lucas also protests that GSA erred in finding Gateway to be responsible under the SFO, because Gateway has filed for bankruptcy under Chapter XI of the United States Bankruptcy Code, 11 U.S.C. § 1101 (1988).

Generally, our Office will not consider protests against affirmative determinations of responsibility absent a showing of possible bad faith or fraud on the part of contracting officials or that the solicitation contains definitive responsibility criteria that allegedly have not been applied. 4 C.F.R. § 21.3(m)(5); Security America Servs., Inc., B-225469, Jan. 29, 1987, 87-1 CPD ¶ 97. Since Lucas does not allege that GSA acted in bad faith and Lucas's allegation does not concern a definitive responsibility requirement, we will not review GSA's affirmative determination of responsibility, and dismiss this basis for protest. In any event, the mere fact that a contractor is undergoing bankruptcy does not require a finding of nonresponsibility. Johnny F. Smith Truck & Dragline Serv., Inc., B-236984, Jan. 2, 1990, 90-1 CPD ¶ 4.

The protest is denied in part and dismissed in part.



for James F. Hinchman
General Counsel